United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1071

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

HAROLD FISHER,

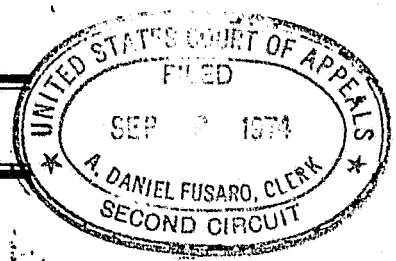
Plaintiff-Appellee,

against

HARRIS, UPHAM & CO. INCORPORATED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANT-APPELLANT

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2. Did the District Court err in imposing a $5,000 sanction against defendant-appellant where a substantial segment of the support for the sanction consisted of what the District Court mischaracterized as "deceit, obstruction and bad faith" by the defendant-appellant which did not exist and was never specified or identified?

3. Did the District Court err in predicating its imposing of the $5,0000 sanction upon what it mischaracterized as evidence of prior obstructive behavior in connection with an earlier order in a motion relating to interrogatories, when in fact there was no finding, or basis for a finding, that defendant-appellant was guilty of any obstructive behavior in its answers to interrogatories?

4. Did the District Court err in considering defendant-appellant to have conceded the materiality of messages, not previously produced, but found as a result of the search of the computerized wire service directed by the Special Master?

5. Did the District Court err in accusing defendant-appellant of bad faith in the absence of any evidence that defendant-appellant has at any time deliberately obstructed discovery?

STATEMENT

This is an appeal by defendant-appellant, Harris, Upham & Co., Incorporated ("Harris, Upham"), from an order of the United States District Court for the Southern District of New York, MacMahon J. (A430)*, filed on November 28, 1973, directing that defendant-appellant pay a sanction of $5,000 and perform a compilation and search of its computerized wire service.

THE FACTS

Plaintiff, Harold Fisher ("Fisher"), a customer of Harris, Upham's Miami Beach branch stock brokerage office, on October 21, and 22, 1968, directed Harris, Upham as his broker to purchase 5,000 shares of the common stock of Bartep Industries, Inc. (A466), an over-the-counter issue. This was done at prices ranging between $5 and $7 per share for a total purchase price of $32,999.25, which was paid by Fisher to Harris, Upham (complaint, A8). Fisher's testimony on deposition was that the stock had been recommended to him by a personal friend (A457 et seq). Fisher testified that this purchase was the result of a tip received from the President of Bartep Industries, Inc. that the corporation had gotten "exclusive jurisdiction of KH3, which is a rejuvination pill" (A461) in the Bahamas.

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* References are to pages of the Joint Appendix.

The complaint alleges that commencing in November, 1968 and up to February 16, 1969, Fisher requested Harris, Upham to deliver to him certificates representing ownership of said 5,000 shares of Bartep Industries, Inc. and that Harris, Upham failed and refused to deliver such shares (complaint, A10). On February 17, 1969, almost four months after the purchase, and after having been advised that there was no market in the common stock of Bartep Industries, Inc., Fisher telegraphed Harris, Upham's New York office seeking to cancel the purchase, and requested return of the purchase price (A11, A483).

The first claim for relief in the complaint alleges upon "information and belief" that Harris, Upham represented to Fisher that it would secure delivery by the settlement date of the purchase transaction and knew at the time of the purchase that it had not purchased said shares from a seller who could make delivery by that time and that Harris, Upham did not intend to pursue any alternate procedure to obtain such delivery (complaint, A9).

The complaint further alleges that Harris, Upham's failure to pursue such alternative procedures as the buying in of such securities, was part of a "conspiracy" with the seller or sellers of said securities to maintain the price thereof and that in so doing, Harris, Upham engaged in a "manipulative

practice in connection with the purchase of securities in violation of Sections 10(b) and 15(c) of the Act", (Complaint, A10).

The second claim for relief seeks refund of the aforesaid purchase price on the theory of money had and received, (Complaint, A11). The third claim for relief seeks damages of $50,000, the price which Fisher claims he could have received for the sale of Bartep Industries, Inc. had he been delivered the certificates by Harris, Upham and seeks an additional $50,000 punitive damages "by reason of Harris, Upham's false and fraudulent acts and gross and wanton breach of its duty to plaintiff", (Complaint, A13).

Issue was joined on October 3, 1969 (A14). After issue was joined, but before any discovery had taken place, Harris, Upham moved (A37) for a more definite statement of the claims for relief alleged in the complaint in which fraud, conspiracy and manipulative practice on the part of Harris, Upham are alleged upon information and belief to have taken place. This motion was predicated upon the requirement of Rule 9(b) of the Federal Rules of Civil Procedure that the circumstances constituting fraud be pleaded with particularity. Judge Bryan denied this motion without an opinion.

Fisher's attorneys proceeded to serve exhaustive and overreaching written interrogatories in two sets dated August 13, 1969 and March 18, 1970 (A21 and A28), and were provided with extremely detailed answers thereto on October 3, 1969, April 2, 1970 and October 5, 1970 (A47, A55 and A67). These detailed answers to interrogatories constitute only a portion of the vast quantity of testimonial and documentary evidence adduced in this case. In addition to the extremely detailed answers to interrogatories, provided, fourteen days of depositions of eight witnesses, officers and employees of Harris, Upham, both in New York and in Florida, were taken. The 248 pages of excerpts in the appendix (A451-A699) is only a portion of the 1,947 pages of total testimony. Additionally, Harris, Upham, both on its own initiative and later at the order of the Special Master, Galgay, proceeded to expend aproximately 451 hours of lawyers' time in responding to varied discovery demands, including the production of 135 bound volumes from which Harris, Upham was required to cull 500 copies and deliver copies to plaintiff. (Affidavit of Charles Trowbridge, A278).

Harris, Upham's amended answers to interrogatories dated October 5, 1970, were the result of a motion by Fisher to compel further answers. The motion was referred by Judge Frankel to Special Master Martin Jacobs, whose report was

dated September 1, 1970 (A132) and approved in an order of Judge Frankel dated September 15, 1970 (A167). Special Master Jacobs and Judge Frankel ruled that certain further answers be provided by Harris, Upham, and also ruled that Harris, Upham be required to pay Fisher $250 for the expenses incurred in obtaining the order. This $250 expense award was relied heavily upon by both Special Master Galgay and the District Court in imposing the $5,000 fine here appealed from. Both Special Master Galgay and Judge MacMahon characterized the prior costs award as the result of prior obstructive behavior. The facts and circumstances surrounding the original $250 costs award will be covered in detail in Point III(A) of this brief.

Harris, Upham twice filed notes of issue and statements of readiness in this case, seeking to conclude discovery and bring the matter on for trial. They were filed on November 6, 1970 and May 28, 1971. Each time Fisher objected. With respect to the first of these notes of issue, although Fisher's objection was untimely, Harris, Upham withdrew the note of issue when advised by Dermot G. Foley, Esq., who is counsel to Fisher's attorney, that he would be trial counsel and would seek only reasonable discovery (Affidavit of Charles Trowbridge, A283). Instead, the exhaustive and overreaching examination of immaterial back office documents dealing with Bartep Industries continued and grew, resulting in Harris, Upham having already incurred over $22,000 in attorneys' fees in this $32,000 case,

before the disproportionate additional costs to be produced by compliance with the ordered appealed from are considered. (Affidavit of Charles Trowbridge, A277).

Fisher's motion to compel the production of documents and records dated July 27, 1971 (A186) was opposed by Harris, Upham (A197), but was disposed of by stipulation of counsel that defendant "will produce and turn over to plaintiff copies of the requested documents." (Order of Magistrate Goettel, A206).

A Special Master to supervise and rule on discovery, John J. Galgay, was appointed by Judge MacMahon on consent of the parties on February 18, 1972 (A207).

On March 28, 1972, counsel for Harris, Upham learned of the existence of the Computerized Wire Service Unit ("CWS unit") a printout of all telex messages passing between Harris, Upham's headquarters and its seventy-two branch offices.

When this was freely and voluntarily disclosed to the Special Master, he ordered it searched for twenty dates to be supplied by Fisher. Harris, Upham was willing to comply with the Special Master's decision, but Fisher refused to supply the dates, and was rewarded for his arrogance by the Special Master on February 23, 1973, when on his own initiative he selected fifty-seven dates and ordered Harris, Upham to search the CWS unit for any messages relating to Bartep stock (A238).

One hundred and thirty-five telex messages were produced as a result of that search (A296-A429) and 722.25 man hours were expended in making this search by Harris, Upham's employees and outsiders hired especially for this purpose at a cost to Harris, Upham of over $3,000. (Affidavit of Michael McAllister A290, Affidavit of Charles Trowbridge A-279).

Of the one hundred and thirty-five telex messages produced as a result of the search, the Special Master in his final report stated that he "found that twenty-three of the messages had been produced at a prior time ..." (A248). As noted in the affidavit of Michael McAllister, one of the attorneys for Harris, Upham, who was directly concerned with supervising the search of the fifty-seven days of computerized message unit printouts, the Special Master's finding in this regard was grossly inaccurate (A290). The specific details of the information ascertained by this search will be covered in Point III(B) of this brief.

Special Master Galgay, in his final report and recommendations dated June 25, 1973, concluded "I am convinced that defendant violated the letter as well as the spirit of the Federal Rules of Civil Procedure governing discovery", referring to the aforementioned earlier costs award of $250 (A248).

The Special Master recommended that sanction of $5,000 be imposed against Harris, Upham and that Harris, Upham be directed to search the CWS unit for computer printouts of telex messages exchanged between Harris, Upham's main office and 72 branch offices for a period of some 177 days (A250).

Since it takes one man about two days just to read one day's messages, the cost to Harris, Upham of making such a search and compilation will approximate $10,000. (Affidavit of Charles Trowbridge, A278) Harris, Upham moved to vacate and strike the Master's report, and for a protective order declaring discovery concluded and directing that the case proceed to trial in regular turn without disproportionate pre-trial activity (A273). Judge MacMahon, in his order dated November 28, 1973, stated that "(d)efendant's prior obstructive behavior is patently relevant to the nature and degree of sanctions now to be imposed as evidence of a continuing history of recalcitrance" (A439), and approved the Special Master's recommendations regarding the $5,000 sanction against Harris, Upham and directed that Harris, Upham conduct a "thorough search" of the CWS unit as recommended by the Special Master (A440), and it is this order which is being appealed from.

SUMMARY OF ARGUMENT

Harris, Upham's position on this appeal is essentially as follows:

1. The decision and order appealed from (A430), and the report of the Special Master upon which it is based (A243) in directing the further CWS search fail to make any attempt to evaluate the considerations essential to the production of a just result, viz., what the issues in this litigation are, what possible enlightment the Court and jury can conceivably obtain from the further document compilations sought upon trial of this action, and what the relationship is between the likelihood of that enlightment and the degree of effort and expense required to conduct such searches and compilations.

2. The District Court and the Special Master have wholly ignored the critical facts that Harris, Upham has throughout offered to produce its files, and has offered to permit Fisher to search through them and the CWS at Fisher's expense and that Fisher is in as good a position as Harris, Upham to conduct the search of the CWS.

3. Harris, Upham's alleged failures in producing documents have taken place in the course of making compilations and selective analyses of documents which are neither contemplated nor required as a matter of law by Rule 34 of the Federal Rules of Civil Procedure, and it should not be punished for inadvertant omissions in taking those steps it should not have been required to take in the first place.

4. In attempting to justify the imposition of the $5,000 sanction against Harris, Upham, Judge MacMahon incorrectly characterized as evidence of "prior obstructive behavior" (A439) an earlier order of Judge Frankel in a motion relating to interrogatories (A167), and resorted to conclusory and unspecified and unsubstantiated accusations of bad faith and obstructiveness.

Judge MacMahon, in treating Harris, Upham as some sort of convicted felon:

a. mistakenly assumed that Judge Frankel had made a finding of bad faith and obstruction. As will be detailed herein there was in fact no finding by either Judge Frankel or Special Master Jacobs (whose report (A132) was approved by Judge Frankel) that Harris, Upham was guilty of any obstructive behavior as regards the answers to interrogatories, and

b. repeatedly described Harris, Upham's production of documents as obstructive and accuses Harris, Upham of bad faith although there was and is no evidence before the Court that Harris, Upham has at any time deliberately withheld any documents.

5. The District Court assumed that Harris, Upham concedes the materiality to the issues in this litigation of 29 out of a total of 135 telex messages not previously produced, but found as a result of the search of the computerized wire service directed by the Special Master. This assumption,

made without any review of those 29 messages in the light of the issues in the case, is grossly incorrect. As will be shown in detail herein, none of these messages are material to any issue in this case.

6. The Special Master and Judge MacMahon failed entirely to impose any reasonable restriction on discovery in this relatively simple non-delivery of stock case, and have produced a situation where Harris, Upham will, if this Court does not correct matters, have spent more money trying to get this case on to trial than it would cost to pay the entire claim when it received the summons and complaint.

7. The irresponsible, unsupported and unsupportable accusations of deceit, obstruction and bad faith contained in Judge MacMahon's decision are calumnies wholly unfair to Harris, Upham and its attorneys who have proceeded with honor and in good faith throughout. These charges should, we submit, be expressly rejected by this Court.

POINT I

THERE SHOULD BE IMMEDIATE APPELLATE REVIEW OF THE DISTRICT COURT'S ORDER SINCE THE ORDER CONSTITUTES A FINDING OF CRIMINAL CONTEMPT, AND FURTHER, BECAUSE IT IS A COLLATERAL DECISION WITH IRREPARABLE AND PREJUDICIAL CONSEQUENCES THAT CANNOT BE CURED UPON A LATER APPEAL

A threshhold question is the appealability of Judge MacMahon's order.

The order being appealed from directs Harris, Upham to pay sanctions of $5,000 for its failure to comply with a discovery order to produce documents, and as such is a citation for criminal contempt.

An order finding a party in criminal contempt is appealable. As noted by Supreme Court in Bloom v. Illinois, 391 U.S. 194, 201 (1968), "(c)criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both". See Gompers v. United States, 233 U.S. 604, 610 (1914); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). Hence an order punishing one criminally for contempt is a final judgment and review may immediately be obtained. Union Tool Co. v. Wilson, 259 U.S. 107, 111 (1922); Bessette v. W. B. Conkey Co., 194 U.S. 324, 336-38 (1904).

An unconditional fine for failure to comply with an order to produce documents is a criminal contempt citation

and, therefore, appealable. Southern Railway Co. v. Lanham, 403 F 2d 119 (5 Cir. 1968). As noted by the Circuit Court at 122:

> " ... This appeal arises out of a contempt citation and $2,000 fine levied against Appellant Southern Railway Company for refusing to comply with the district court's order requiring it to produce certain documents under Rule 34 of the Federal Rules of Procedure ...
>
> Although the entitling of the order of recitals contained in the order may be considered, see Fox v. Capital Co. supra, the appellate court on review must determine in light of the nature and purpose of the punishment. Shillitani v. United States, 1966, 384 U.S. 364, 369, 8 S.Ct. 1531, 1535, 16 L.Ed. 2d 622; see Stewart v. Dunn, 5th Cir. 1966, 363 F 2d 591, 600, N.5. The substance of the contempt rather than its form is our guide. Accordingly, this Court must determine whether the contempt order here is civil or criminal.
>
> The important tests in determining the character of a contempt are the nature and purpose of the punishment. Donato v. United States 3d Cir. 1931, 48 F. 2d 142; 4 Barron, Federal Practice and Procedure § 2422 (1951); see Fox v. Capital Co. supra, Civil contempt is "wholly remedial" serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance. McComb v. Jacksonville Paper Co., 1949, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599; Penfield Co. of California v. S.E.C. 1947, 330 U.S. 585, 590, 67 S.Ct. 918, 921, 91 L.Ed. 1117; McCrone v. United States, supra; Scott v. Hunt Co. 5th Cir. 1968,

> 398 F. 2d 810 (July 24, 1968); 6 Moore's Federal Practice P. 54.17. Criminal contempt, on the other hand, is punitive, rather than remedial, serves to vindicate the authority of the court, and cannot be ended by any act of the contemnor. Nye v. United States, 1941, 313 U.S. 33, 43, 61 S.Ct. 810, 813, 85 L.Ed. 1172; Fox v. Capital Co., infra; Gompers v. Bucks Stove & R. Co., supra, Barron, Federal Practice and Procedure § 2422, at 374-75. On the basis of these well-established principles, we conclude that the order before us is criminal. The order imposes an unconditional fine payable to the court for appellant's 'wilful and wanton disregard for this Court's order of production'. It awards no relief to a private suitor.' Nye v. United States, supra. 'It does not permit appellant to purge itself and remove the sanction by compliance with the court's discovery order. The contemnor does not carr(y) the keys of his prison in his own pocket,' and therefore the fine'operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.' Gompers v. Bucks Stove & R. Co. supra, 221 U.S. 418 at 422, el S.Ct. 492 at 498, 55 L. Ed. 797 at 806

Similarly, it can be readily seen that the unconditional fine directed by the Court in this case is punitive, rather than remedial, serves to vindicate the authority of the Court, and cannot be ended by any act of the contemnor. It is clear that on the basis of these well established principles the fine in question is criminal rather than civil contempt. As noted by the Supreme Court in Gompers v. Bucks Stove & R. Co. 221 U.S. 418, 31 S.Ct. 492 (1911) at 442, the contemnor does not

"carr(y) the keys of his prison in his own pocket" and, therefore, the fine operates not as a coercive remedy, but solely as punishment for the completed act of disobedience. It is clear that precisely this type of punishment was the purpose for the trial court's acceptance of the sanction. As noted in the trial court's opinion, "(f)ailures to comply with discovery orders are genuine threats to the sound, fair and efficient administration of justice. Such failures will be dealt with severely". (A439). Vindication of a court's authority is a characteristic of criminal, not civil, contempts and such was the purpose of the order in this case.

In the recent decision of this Court, I.B.M. v. United States of America, 493 F. 2d 112 (2 Cir., 1973), Judge Oakes noted at 115 that:

> "The hallmark of civil contempt is that the sanction imposed is only contingent and coercive. Shilitani v. United States, 384 U.S. 364, 370 (1966); Penfield Co. v. SEC 330 U.S. 585, 590 (1947); United States v. UMW, 330 U.S. at 303: Gompers v. Bucks Stove & Range Co., 221 U.S. at 442. See Dobbs, 56 Cornell L. Rev. at 237. Civil contempt, moreover, has a remedial purpose -- compelling obedience to an order of the court for the purpose of enforcing the other party's rights, or obtaining other relief for the opposing party. Nye v. United States 313 U.S. 33, 42 (1941); McCrone v. United States, 307 U.S. 61, 64 (1939); Gompers v. Bucks Stove & Range Co. 221 U.S. at 441. The distinction between civil and criminal contempt is, in short, 'usually based on the purpose for which the contempt sentence is meted out.' Dobbs, 56 Cornell L. Rev. at 235."

In that case, this Court found that the sanction imposed, $150,000 per day until I.B.M. complied with the discovery order, was both coercive and contingent. I.B.M. had the ability to purge itself of the contempt at any time by compliance with the discovery order, indicating a civil rather than a criminal contempt. As the Court noted at 115:

> "The district court did not leave in doubt the purpose which the contempt citation here was to serve. The order, dated August 1, 1973, makes it clear that the fine is for each day that I.B.M. 'fails to comply with Pretrial Order No. 5' and that I.B.M. is 'entitled to purge itself of his contempt at any time' by compliance with the discovery order. The order of July 10, 1973 requiring that the hearing proceed in respect to the possibility of contempt, clearly states that the hearing is to be 'on the issue of a coercive fine ...'. Thus the order was both coercive and contingent, indicating a civil rather than criminal contempt."

See also Dobbs, Contempt of Court; A Survey, 56 Cornell L. Rev. 183 (1971), wherein it is stated at 237:

> " ... the coercive feature of the civil contempt sentence is reflected in its indeterminate nature. The contumacious party need not stay in jail for any definite term; he may get out at will. He need only purge himself of his contempt by complying or showing a willingness to comply with the court's order. This is classically expressed in the aphorism that the person imprisoned for civil contempt carried the keys to the jail in his own pocket. The hallmark of the criminal sentence, on the other hand, is that it is determinate."

It is abundantly clear that by precisely this standard, i.e. the ability of contemnor to purge itself by compliance, which is not present in the case at hand, the contempt citation in this case is criminal rather than civil. As such, a review on appeal may immediately be obtained.

Additionally, since the order of the District Court made a determination as to "claims of right of parties separable from, and collateral to, rights asserted in the action", and since the order of the District Court did not make any step toward final disposition of the merits of the case and this order will not be merged in final judgment, it is clear that these issues are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684, 70 S.Ct. 861, 94 L.Ed. 1260 (1950).

As noted by the Supreme Court in the Cohen case, supra, certain orders that do not fully and finally determine the controversy between the parties are nonetheless appealable under 28 USC Sec. 1291 (a) the order is a final determination of a claim of "separable from, and collateral to" rights asserted in the action, (b) it "presents a serious and

unsettled question" and (c) its review cannot, in the nature of the question that it presents, await final judgment because "when that time comes, it will be too late effectively to review ... order and rights conferred ... will have been lost, probably irreparably". Cohen v. Beneficial Loan Corp., supra, at 546-547.

The order of the District Court meets this test in all respects. In addition to the sanction of $5,000 imposed by the District Court, by ordering Harris, Upham to conduct a "thorough search" of its unindexed computer wire service containing a printout of every one of thousands of telex messages exchanged between its head office and its 72 branch officesm many for dates before and after Fisher's purchase and purported recission (see examples A296-A429), the District Court has ordered a search that will cost an extra $10,000 to conduct, and consume in excess of 2,200 man hours. Harriss, Upham's right to avoid what it asserts is a senseless, wasteful and totally unproductive discovery is a right entirely separable from the rights asserted in the action. It is clear that in view of the expense both in time and money to Harris, Upham, this order presents a question which would certainly qualify as "serious and unsettled", and the review of this order cannot await final judgment. By that time, Harris, Upham will have been forced to conduct and

finance this senseless and wasteful search, and by so doing will suffer irreparable and irretrievable loss and damage which a later appellate court reversal could not correct.

It is, therefore, clear that since the order of the District Court constitutes a finding of criminal contempt, and since the order is a collateral decision pursuant to the rule of Cohen v. Beneficial Industrial Loan Corp., Harris, Upham is entitled to review at this time.

POINT II

THE DISTRICT COURT ERRED IN ORDERING DEFENDANT-APPELLANT TO CONDUCT A "THOROUGH SEARCH" OF A VOLUMINOUS, UNINDEXED COMPUTERIZED WIRE SERVICE

(A) THE DISTRICT COURT AND THE SPECIAL MASTER WHICH IT APPOINTED, AND WHOSE RECOMMENDATIONS IT CONFIRMED, FAILED TO WEIGH THE HARDSHIP AND EXPENSE TO DEFENDANT-APPELLANT WHICH WOULD BE OCCASIONED BY CONDUCTING THE SEARCH OF THE UNINDEXED COMPUTERIZED WIRE SERVICE AS AGAINST THE LIKELY VALUE OF THE INFORMATION SOUGHT

The order of the District Court to conduct a "thorough search" of the unindexed computer wire service containing a printout of every one of thousands of telex messages exchanged between its head office and 72 branch offices for a period of some 172 days is a drastic, punitive and totally unwarranted measure which has come after Harris, Upham's attorneys have expended over 450 hours in attempting in good faith to comply with Fisher's encyclopedic demands for discovery of wholly irrelevant and immaterial documents, obtainable only by a physical search of voluminous similar documents (Affidavit of Charles Trowbridge, A278), 14 days of depositions of 8 witnesses here and in Florida, and after a search of 57 days of the computer wire service has already been made requiring the expenditure of over 722 man hours (Affidavit of Michael McAllister, A270), and which has not

produced a single message having any meaningful significance on any issue in this $33,000 case. Additionally, Harris, Upham has produced approximately 135 bound volumes and culled and compiled therefrom approximately 500 documents and delivered same to appellee (Affidavit of Charles Trowbridge, A279).

Vast quantities of testimonial and documentary evidence have been adduced in this case. However, nowhere in the pleadings or in the vast quantities of evidence adduced by way of depositions, extensive answers to interrogatories and exhaustive production of documents is there any specification of fact or any scintilla of proof to support Fisher's claims of fraud and conspiracy, (Complaint, A9).

We are still totally in the dark as to any particulars of these assertions or any evidentiary support thereof.

Yet it is solely upon these baseless, speculative charges that Fisher has claimed to be entitled to require Harris, Upham to conduct, at its expense, the aforementioned far ranging searches of the computerized wire service for periods which include dates for 6 1/2 months subsequent to the purported recission of Fisher's purchase (from February 7, 1969 to August 31, 1969), and three weeks prior to the purchase from October 1, 1968 to October 21, 1968).

Harris, Upham's position on the merits of this case is that Fisher, prior to purchasing Bartep Industries, Inc.

stock, had consistently maintained securities in his account with Harris, Upham in "street name" (i.e. stock was held in Harris-Upham's name, and Harris, Upham retained the certificates); that Fisher did not request delivery of certificates representing the issues he had purchased until he learned that there was no market in this stock; that his attempted recission was nothing more than an attempt to foist his speculative losses caused by insider tips of his friends, upon Harris, Upham; and that Fisher had no right to rescind his purchase, since at any time he could have directed the sale of stock, which was being maintained by Harris, Upham as custodian throughout this period.

Therefore, the issues in this case are merely whether Harris, Upham failed within a reasonable time to deliver Fisher's stock to him, after having been requested to do so, and whether or not this failure was excusable, and if Harris, Upham is liable by reason of such failure to deliver, the extent of Fisher's losses proximately caused by the failure. The discovery of evidence, and information leading to evidence, relevant and material to these issues has long been abundantly complete.

However, in its decision ordering Harris, Upham to conduct a thorough search of the unindexed computer wire service, it is clear that the District Court failed to consider the nature of this case, the issues raised herein, and also failed to balance the likelihood of developing facts material thereto against the overwhelming hardship to Harris, Upham involved in conducting this search as directed by the Special Master.

Rule (1) of the Federal Rules of Civil Procedure admonishes "that the Federal Rules shall be construed to secure the just, speedy and inexpensive determination of every action" (emphasis added).

Rule 25(c) provides for orders to protect a "party from annoyance, embarrassment, oppression or undue burden or expense" (emphasis added) through the use of discovery.

In cases where a segragation and analysis of great amounts of material is demanded or where data and information must be compiled and collated, the greatest share of the burden and effort should fall on the party seeking the information, Tytel v. Richardson-Merrell, 37 FRD 351 (S.D.N.Y. 1965). The Court should weigh the annoyance and expense involved against the value of the information sought. U.S. v. Imperial Chemical Industries, Inc., 8 FRD 551 (S.D.N.Y. 1949).

In order for a Court to evaluate what is "undue burden or expense" in this context, it must consider the nature of the case, the issues and amounts involved, and weigh the benefits to be expected from the discovery requesting against the burden and expense that providing it will cause. It is submitted that this simply has not been done in this case. There is not one word in the Special Master's report (A243) or in the District Court's decision (A430), which reflects any consideration of these factors.

It is submitted that the burdensome search of the computerized wire service which Harris, Upham has been directed to make is extremely unlikely to produce any material facts not already before the Court, and will cost about one-third of the amount sued for. Furthermore, it will do nothing but further delay this case which Harris, Upham has been ready and willing to try since 1970.

Although it was critical to the fair determination of the issues before them, neither the opinion of the Special Master nor the District Court mention the undeniable fact that Harris, Upham has repeatedly offered to produce the entire computerized wire service, so that Fisher can conduct his own search (Affidavit of Charles Trowbridge, A281).

Such a procedure, whereby the records or documents are made available to the party desiring it, and that party examines the documents for whatever information it desires, has long been held to be a fair procedure and one advantageous to both parties. In the case of Reid v. Richardson Merrell, Inc., 37 FRD 363 (N.D. Ga., 1964), plaintiff had requested that certain documents be produced. Rather than order such production, the Court directed that the defendant make available for inspection by the plaintiff the microfilms of the approximately 107 documents, among which the documents sought were to be found. The Court at 363 noted:

> "Since defendant has offered to make a complete microfilm of said records available to plaintiff for inspection, the Court in its discretion, deems such a procedure fair and advantageous to both parties ... while at the same time relieving defendant of the cost of searching its records."

It is apparent from a review of the facts herein that Fisher has been spending years requiring Harris, Upham to produce and be examined about every transaction or possible transaction in which Harris, Upham's customers have had involving Bartep Industries, Inc., the stock Fisher purchased on a tip from his friend (A461), as well as all information pertaining to the handling and delivery of the stock certificates of others, none of which has anything to do with Fisher or his stock.

In cases such as this, the courts have not permitted a party unlimited discovery. As noted by the District Court in Waldron v. British Petroleum Co., 4 FR Serv. 2d 306.23, Case 1 (S.D.N.Y. 1961):

> "Because plaintiff's claim against the defendant Cities Service Company is, judged by the entire available record, so insubstantial the plaintiff will not be given carte blanche authority to conduct untrammeled pre-trial proceedings."

The courts have made it clear that Rule 34 of the Federal Rules providing that a court may order a party to produce and permit inspection and copying of designated documents was never intended to allow fishing excursions, nor does it authorize the court to require production of documents which

could be produced only after weeks of labor and at great cost. Service Liquor Distributors v. Calvert Distillers Corp., 116 FRD 344 (S.D.N.Y. 1955), Sonken-Galamba Corp. et al v. Atkinson T. & S.F., 30 F. Supp 936 (DC Mo., 1940). As noted by the District Court in the Sonken-Galamba Corp. case, supra, at 937:

> "It was represented at the argument of the motions that weeks of labor and great cost would be necessary to comply with an order to produce such documents and those representations obviously are true. But if the rule is construed so as to bring about such a result probably it is invalid. Certainly a plaintiff cannot compel a defendant to come into court and subject him to great costs before there is any judgment against him. The Fifth Amendment U.S.C.A. Const., stands in the way."

For all of the above reasons, it is clear that in view of the nature of this case, and the hardship and expense to Harris, Upham which would be occasioned by conducting the search as directed, balanced against the likelihood of producing any material facts, further discovery should be curtailed. The trial court erred in ordering Harris, Upham to conduct this "thorough search" of the unindexed computer service, and the order should be reversed.

(B) THE DISTRICT COURT IGNORED THE FACT THAT DEFENDANT-APPELLANT HAS COMPLIED WITH RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND ERRED IN DIRECTING THE MAKING OF EXTENSIVE AND DISPROPORTIONATELY EXPENSIVE COMPILATIONS AND ANALYSES NOT REQUIRED BY THAT RULE

Rule 34 of the Federal Rules of Civil Procedure provides that:

> "(a) Scope any party may serve on any other party a request (1) to produce or permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents..." (Emphasis added).

It is clear from the wording of this Rule that its purpose is to have the party making the request perform whatever actions are necessary for the inspection and copying of the documents. Harris, Upham has fully complied with the rule since it has produced the computerized wire service for Fisher to inspect and copy, and has consistently offered Fisher the opportunity to come in and search appellant's records and make its own compilations. Fisher has refused to do so, a fact incredibly not mentioned in either the Judge McMahon's decision or the Special Master's report, and has insisted that Harris, Upham employ its personnel to review page by page this CWS Unit, commonly referred by Harris, Upham's personnel as the "dump" because of its monstrous, voluminous size.

Many decisions of courts in this circuit support the proposition that burdensome compilations are not required to be made in the cause of discovery under the Federal Rules. In Konczakowski v. Paramount Pictures, 20 FRD 588, (S.D.N.Y. 1957), this Court stated at p. 593:

> "The general rule is that a party should not be permitted to compel his opponent to make compilations or perform research investigations...which he might make himself by obtaining production of the books and records pursuant to Rule 34."

See also United Cigar-Whalen Stores Corp. v. Philip Morris, 21 FRD 107 (S.D.N.Y. 1957), Tytel v. Richardson Merrell, Inc. (37 FRD 351, 353 (S.D.N.Y. 1975); and Triangle Manufacturing Co. v. Paramount Bag Manufacturing Co. 35 FRD 540 (E.D.N.Y. 1964), where the District Court stated at p. 543:

> "As to the information sought by interrogatory 1(c), Triangle states in its moving papers that 'a cataloguing of the places and dates of such promotional activities would fill a book and would take six months of office time to compile'. Although this claim may be somewhat exaggerated, it seems clear that such a compilation would require an inordinate amount of time and effort and that the answers to the other interrogatories would require an equal, if not greater, expenditure. Under these circumstances, and since an order pursuant to Rule 34 would properly lie for the production of these records, it seems only fair that the party seeking such information be required to bear the burden of extracting and collating it."

Harris, Upham has always been willing to place the computerized wire service at Fisher's disposal. The only thing it has not been willing to do is to conduct the searching, collation and compilation itself at its own expense. Harris, Upham has already complied with Rule 34, by having produced the computerized wire service for inspection and copying, which it continues ready to do. It should not be required to perform the grotesque, sinfully wasteful exercise in menial, unproductive activity directed by the District Court without any consideration of the issues in the case, the balance between the likely benefit to the Court and the burden of the task, and without mention of Harris, Upham's continued willingness to permit Fisher to look at, copy and extract anything he wants - - at his expense.

POINT III

THE DISTRICT COURT ERRED IN IMPOSING A $5,000 SANCTION IN THAT IT OVERLOOKED CRITICAL FACTS AND MADE INCORRECT ASSUMPTIONS TO SUPPORT ITS CLEARLY ERRONEOUS DETERMINATION THAT DEFENDANT-APPELLANT WAS GUILTY OF "DECEIT, OBSTRUCTION, AND BAD FAITH", A STATE OF AFFAIRS WHICH WAS NOT SHOWN TO EXIST, AND DID NOT EXIST

(A) THE DISTRICT COURT ERRONEOUSLY PREDICATED THE IMPOSITION OF THE $5,000 SANCTION UPON WHAT IT MIS-CHARACTERIZED AS EVIDENCE OF PRIOR OBSTRUCTIVE BEHAVIOR, CONSISTING OF AN EARLIER, UNRELATED ORDER OF JUDGE FRANKEL ON A MOTION RELATING TO INTER-ROGATORIES, WHICH CONTAINED NO FINDING OF ANY OBSTRUCTIVE BEHAVIOR.

In predicating the imposition of the $5,000 sanction against Harris, Upham upon what it characterized as evidence of "prior obstructive behavior" (A439) in connection with an order of Judge Frankel in a motion relating to interrogatories (A167), and upon conclusory accusations of bad faith and obstructiveness, Judge McMahon mistakenly assumed that Judge Frankel had made such a finding. There was no such finding by either Judge Frankel or Special Master Jacobs (whose report (A132) was approved by Judge Frankel), that Harris, Upham was guilty of any obstructive behavior as regards the answers to interrogatories.

Fisher, in this earlier order, was merely awarded the "expenses" of the motion at the initiative of Special Master Jacobs (145a), who specifically stated that he considered that Rule 37 of the Federal Rules "requires" that costs be awareded to the prevailing party (A143), and he had considerable difficulty deciding which party that was (A142 et seq).

In footnote 6 to the Judge McMahon's decision referring to the answers to interrogatories made by Harris, Upham prior to the appointment of Special Master Galgay, the following statement appears:

> "6. Magistrate Jacobs found defendant's answers were made in an 'overtechnical and disingenueous manner ... and inexcusable ... and precludes finding that the defendant's opposition was substantially justified'." (A445)

Judging by the above-quoted footnote, the District Court was under the misapprehension that all of Harris, Upham's answers to interrogatories were unsatisfactory when it concluded that this constituted evidence of "a continuing history of recalcitrance" (A439).

Not so.

Special Master Jacobs upheld Harris, Upham's answers to fourteen of the interrogatories over the objections of Fisher. As to nine answers, particularly those where Harris, Upham stated it did not have the information as to 700 of the 5,000 shares purchased by Fisher, but would endeavor to provide same, Special Master Jacobs directed Harris, Upham to provide that information if it became available. As to four of the interrogatories objected to by Harris, Upham as overly broad, Special Master Jacobs recommended that Harris, Upham be required to answer those interrogatories, but only after their scope was limited by the Special Master.

On the question of reasonable expenses, where Special Master Jacobs awarded Fisher $250,00, it is important that the Special Master's decision be read in haec verba (A142):

"Each party has requested 'reasonable expenses' in connection with the motion. Rule 37, as amended, provides that if the motion is granted or denied the Court shall require the party 'whose conduct necessitated the motion' or 'the moving party' as the case may be, to pay 'the reasonable expenses incurred' 'unless the Court finds that the opposition to the motion (or the moving party) was substantially justified' or 'that other circumstances make an award of expenses unjust.' The Rule formerly provided for expenses if 'the Court finds that the refusal (or making of the motion) was without substantial justification.' As set fort in the Note of the Advisory Committee (48FRD 539, et seq), the change requires that expenses be awarded unless (underscoring furnished) the conduct of the losing party or person is found to be substantially justified'; and that the test of 'substantial justification remains, but the change in language is intended to encourage judges to be more alert to abuses occurring in the discovery process.' The Note recognizes that if the dispute is 'genuine', the losing party is 'substantially justified'; that a 'necessary flexibility is maintained since the Court retains the power to find that other circumstances make an award unjust--as where the prevailing party also acted unjustifiably'; and that 'the amendment does not significantly narrow the discretion of the Court.' In determining the matter before us, therefore, it is necessary to determine (a) who is the 'prevailing party'; (b) whether the 'losing party' has shown 'substantial justification' for its position; and (c) even if the prevailing party might otherwise be entitled to reasonable expenses, whether this would be 'unjust' since the prevailing party in fact 'also acted unjustifiably.' In the frequent situation, where some of the party's contentions are sustained and some are reflected, these questions may involve a great measure of discretion which must be exercised in the light of the 'entire setting.'

> "A party should qualify as the 'prevailing party', even though all of its contentions are not sustained if its main and important contentions are upheld. The question should not be determined by a 'counting of items.' While some of the requests have been denied (according to the recommendation) as argumentative or unnecessary, further answers have been recommended as to the payment by defendant of the money received, the 300 shares, the 700 shares, and the 'fail position' with respect to the two selling brokers - matters important on plaintiff's theory. Plaintiff should be regarded as the prevailing party.'
>
> "Has defendant shown substnatial justification for its oppsotion? Many of defendant's answers are incomplete, but were it not for the answers to #11 of the first set and #8 of the second set (payment of the funds received from plaintiff) the undersigned would be reluctant to say that defendant did not act with 'substantial justification.' However, the over-technical and disingenuous manner in which these were answered is, in the view of the undersigned, inexcusable and precludes a finding that defendant's opposition was 'substantially justified'.
>
> "While some of the plaintiff's requests were excessively detailed and argumentative it is believed that under all the circumstances an award of expenses would not be 'unjust'. It is recommended, therefore, that defendant or its attorney be required to pay plaintiff $250 for the expenses incurred in obtaining the order for further answers." (Emphasis added)

It is, therefore, clear that the answers to only two interrogatories, number 8 and 11, formed the basis of the Special Master's allowance of the $250.00 as "expenses". It is important that we closely examine these two interrogatories and answers.

Interrogatory #11 of the first set (23A) reads as follows:

> "Set forth the name of the broker-dealer to whom and the time when defendant paid the $32,999.25 which defendant has received from plaintiff for the purchase of said shares of Bartep."

and the answer (51A) reads as follows:

> "Defendant did not pay to anyone or any group of broker-dealers, the sum of $32,999.25 nor did defendant receive that amount from plaintiff for the purchase of shares in Bartep Industries, Inc., as erroneously presupposed by this interrogatory."

The interrogatory was incorrect because the amount should have been $33,099.25. Thus, Harris, Upham's answer to this interrogatory was strictly correct. In assessing Harris, Upham's unwillingness to unilaterally amend Fisher's interrogatory for Fisher's benefit, it should be noted that the answer to interrogatory #5 of the first set (A48) already had provided the names of all broker-dealers from whom appellant-defendant had purchased 4,000 of the 5,000 shares of Bartep Industries, Inc. stock purchased for Fisher, identified 300 shares as having been purchased by pairing off 300 shares sold on October 22, 1968 by "a customer of defendant's Fort Lauderdale branch office" who was not a broker-dealer, and was silent as to 700 shares because of the simple reason that Harris, Upham was unable to develop this information. The names of the broker-dealers is all the interrogatory called for.

Perhaps, viewed in hindsight, Harris, Upham's answer should have ignored Fisher's incorrect figure, and corrected his mistake, but surely the failure to do so should not be regarded as deliberate obstruction of discovery. Moreover, as stated above, the names of the brokers in question had already been given and only the names of broker-dealers were requested.

The second interrogatory in question was #8 of the second set (A32), which reads as follows:

> "Set forth the name(s) of all the persons or firms to whom, the amount and the date when the defendant paid any monies on account of the purchase by the defendant for the account of the plaintiff of shares of stock of Bartep Industries, Inc."

The answer (A57) reads as follows:

> "Previously answered. See answer No. 11 in Answers to Interrogatories dated October 3, 1959."

Harris, Upham concedes that is answer to this interrogatory should have been more complete, but it must be noted that this was only one of many, many interrogatories delving into back office transactions of Harris, Upham, in pursuit of the baseless accusations of fraud and conspiracy.

The names of the brokers who had provided the shares of Bartep Industries, Inc. stock purchased by Harris, Upham for the account of Fisher to the extent known had already been made available as had the dates of the respective transactions. There was never any allegation in the complaint

that Harris, Upham did not pay for the stock it purchased in Fisher's account. It is undisputed that the stock in question was listed as a "long" in Fisher's account month after month in the monthly reports thereof which Fisher received.

Under these circumstances, it is submitted that, while conceding that the answer to interrogatory #8 of the second set propounded by Fisher was partially incomplete, this too does not constitute what the District Court declared to be a "continuing history of recalcitrance".

It is also important to note that Judge Frankel's order confirming Special Master Jacobs' report in some respects and modifying it in others stated solely as to the matter of costs that "defendant shall pay the plaintiff $250 for his expenses in obtaining this order". (A170)

Nowhere in either Judge Frankel's decision or the report of Special Master Jacobs is there any finding whatsoever that Harris, Upham was in bad faith or was obstructive. The sole basis for the assessment of these costs, which was not a fine or penalty, was in the two answers to interrogatories noted above.

(B) THE MESSAGES NOT PREVIOUSLY PRODUCED, BUT FOUND AS A RESULT OF THE SEARCH OF THE COMPUTERIZED WIRE SERVICE DIRECTED BY SPECIAL MASTER GALGAY CONTAIN NOTHING MATERIAL OR LIKELY TO LEAD TO ANYTHING MATERIAL TO ANY ISSUE IN THIS CASE, AND THE DISTRICT COURT ERRONEOUSLY CONSIDERED DEFENDANT-APPELLANT TO CONCEDE THE MATERIALITY OF THESE MESSAGES

As a result of Harris, Upham's search of the computerized wire service for the 57 days selected by the Special Master (A296-A429), 135 messages were located. Seventy-five of the telexes (A296-A369) had previously been produced and marked for identification during the thirteen days of depositions of Harris, Upham's officers and employees (Affidavit of Michael McAllister, A290). Thirty of these messages (A370-A399) were not covered by the Rule 34 order in this case in that they constitute nothing more than requests to Harris, Upham's over-the-counter department for quotes on the price of Bartep stock and the over-the-counter department's responses thereto (Affidavit of Michael McAllister, A290). One message (A400) was an administrative message regarding a particular certificate of Bartep stock which has no bearing to any issue in this case.

This leaves 29 messages (A401-A429).

Judge McMahon erroneously assumed that Harris, Upham conceded the materiality of these twenty-nine telex messages. His decision states (A436):

> "Defendant seems to concede that the latter twenty-nine messages are covered by the Rule 34 Order and are material to the issues in this litigation, but claim that there is no new information in the twenty-nine messages."

This is simply not so. These messages are covered by the Rule 34 Order, but they are not material to any issue in this case. This fact would have been apparent to Judge McMahon had he formulated these issues and evaluated these twenty-nine messages in the light thereof, which he failed to do. We, therefore, respectfully request this Court to make this evaluation with us.

The first three of these messages (A401-A403) are dated December 19, 1968, and simply deal with the fact that Bartep changed its transfer agent, and have nothing whatsoever to do with any issue herein. The circumstances surrounding these messages had already been testified to by William Smythe, Harris, Upham's supervisor of stock transfer (A491-502, A503-A520).

The next message (A404) is an order for the sale of 270 shares of Bartep at the market on January 13, 1969 for a customer other than Fisher. The following message (A405) explains that there was no bid in connection with that transaction for Bartep although the stock was offered for a price of $4.00. This too is totally irrelevant.

The next five wires (A406-A410) dated February 7, 1969 were from a former employee of Harris, Upham in Fort Lauderdale to Albert Key, Harris, Upham's supervising officer of the over-the-counter department, requesting permission to deal with a broker-dealer identified as "Wesco". The first of these messages (A406) indicates that "Wesco" was making a market in Bartep and requests Mr. Key to advise if that organization can be traded with. This action has nothing whatsoever to do with Fisher or the case in issue. The next message (A407) is a duplicate of the prior one, as is the next (A408), and the next (A409). The circumstances surrounding these messages had already been testified to by Mr. Key (A548-A578). The next message (A410) is also one dated February 7, 1969 in which the registered representative at the Miami Beach Office who handled Fisher's account inquired of the New York office as to whether it had heard of any market for Bartep Industries, Inc. stock. This inquiry was repeated in a later message on the same date (A412) and the response to these inquiries (A413) was that there was no market in the stock, a fact well known to Fisher from the inseption of this lawsuit and when he purported to rescind his purchase (A475-A484). These messages add nothing.

The next message (A414) made on February 11, 1969 constitutes a request from Fort Lauderdale regarding the transfer status of a customer's Bartep stock. The customer was not Fisher. The next message (A415) is a reply thereto. The irrelevant facts surrounding these two wires were testified to at length by Harris, Upham's Fort Lauderdale branch office manager James Simpson (A614-A629, A630-A633).

The remaining 14 messages (A416-A429) constitute either inquiries to see if a market for Bartep could be located or inquiries as to the transfer status of Bartep stock during this period, namely between February 13, and 28, 1969. None of these documents are material to any disputed issue in this case, and all of them or their contents had been fully explored on deposition (deposition of B. Cowan, A637-A648, A649-A653; deposition of A. L. Key, A579-A584, A585-A597, A598-A606, A607-A610; deposition of S. Long, A659-670; deposition of W. O. Smythe, A521-A544; deposition of R.M. Mallett, A683-A696).

Such was the scanty yield of the fifty-seven day search of the CWI unilaterally directed by Special Master Galgay after Fisher had refused his direction to select twenty days to be searched. So we say, after all this, to require Harris, Upham to expend a further $10,000 searching and making compilations from the computerized wire service for an

additional 7-1/2 month period either before Fisher's purchase or after his purported rescission without any analysis of the issues or the burden thereof, would be one of the most flagrant abuses of discovery on record.

We ask this Court to correct this dismal state of affairs.

(C) THE DISTRICT COURT CARELESSLY AND IRRESPONSIBLY CHARGED DEFENDANT-APPELLANT WITH BAD FAITH ALTHOUGH THERE WAS NO EVIDENCE WHATSOEVER THAT DEFENDANT-APPELLANT HAS AT ANY TIME DELIBERATELY OBSTRUCTED DISCOVERY

The District Court described Harris, Upham's conduct with regard to production of documents as "deceit, obstruction and bad faith" (A438). This is judicial character assassination. There was and is no evidence that Harris, Upham has at any time deliberately withheld any document. The word "obstructive" (A439) implies such deliberate withholding and its use by Judge McMahon was patently unfair.

At the very worst, Harris, Upham has been guilty of unintentional failure to locate at one time all of the overwhelming number of irrelevant and immaterial documents demanded. With respect to the charge that the production of documents has been "piecemeal" (A437), Harris, Upham concedes this. The production of documents over a period of time, rather than all at once, was necessitated by the fact that these documents are not classified by the particular security, but rather by day

files. However, Harris, Upham has attempted to comply with Fisher's demands, and as noted above has consistently offered Fisher the opportunity to come and search Harris, Upham's records and make his own compilations.

Although the production has been piecemeal, there is not one shred of evidence anywhere in the records of this case to suggest that Harris, Upham's piecemeal production of these documents was in any sense prompted by considerations of tactics, obstruction of justice or concealment, as implied by Judge McMahon.

Harris Upham has always been willing to place the computerized wire service at Fisher's disposal. The only thing it has not been willing to do is conduct the "thorough search" which involves extensive compilation at its own expense. How the District Court could have considered Harris, Upham's offer to permit Fisher the opportunity to make the examination himself indicative of "deceit, obstruction and bad faith" is beyond explanation.

To summarize, the District Court and the Special Master have overlooked the critical facts that Harris, Upham has throughout provided voluminous documents, has never deliberately withheld any document and has consistently offered to permit Fisher to search through them and the computerized wire service at Fisher's expense, which is clearly not the conduct of a party bent on obstruction, deceit or concealment.

Harris, Upham's alleged failures in producing documents have taken place in the course of making compilations and secured analyses of documents it has produced which, as noted in Point II(B) of this brief, are neither contemplated nor required under Rule 34 of the Federal Rules.

CONCLUSION

For the foregoing reasons, it is submitted that the District Court was in error in ordering Harris, Upham to conduct a "thorough search" of the unindexed computer wire service and in imposing a $5,000 sanction against Harris, Upham, and this order of the District Court should be reversed, and an early trial on the merits directed.

Respectfully submitted,

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Court Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD FISHER,

Plaintiff-Appellee,

against

HARRIS, UPHAM & CO. INCORPORATED,

Defendant-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 3rd day of September, 1974, he served two copies of the Brief of Defendant-Appellant on the attorneys for the Livingston, Livingston & Harris, Esqs. Plaintiff-Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. 292 Madison Avenue, New York (17) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

3rd day of September, 1974.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976